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No. 82-1652

In the Supreme Court of the United States

OCTOBER TERM, 1982

LAWRENCE GOLDSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's mail fraud conviction was improperly based on a breach of fiduciary duty not imposed by state or federal law.

2. Whether petitioner's conviction for mail fraud was improperly based on a theory of constructive fraud.

4. Whether the evidence was sufficient to establish the falsity of claims forms submitted under a state medicaid program.

4. Whether petitioner had sufficient notice that his conduct was criminal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 695 F.2d 1228.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1981. A petition for rehearing was denied on January 21, 1983. The petition for a writ of certiorari was filed on April 8, 1983, and is therefore out of time under Rule 20.1.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioner states (Pet. 2) that his suggestion of rehearing en banc was denied on February 18, 1983. However, the pendency of an en banc suggestion does not affect the finality of the court of appeals' judgment (Fed. R. App. P. 35(c)) and therefore does not toll the time for filing a petition for a writ of certiorari.

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas petitioner and two co-defendants were convicted on ten counts of mail fraud, in violation of 18 U.S.C. 1341, four counts of making false statements, in violation of 18 U.S.C. 1001, and one count of possessing and distributing controlled substances, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to concurrent terms of three months' imprisonment and fined $25,000. The court of appeals affirmed petitioner's mail fraud and false statement convictions and reversed his conviction for distributing controlled substances (Pet. App. A1-A19).[2]

The evidence at trial is fully described in the court of appeals' opinion (Pet. App. A4-A6) and may be summarized as follows. Petitioner was president and principal stockholder in Morrow-Keeling, Inc., which operated several retail pharmacies, including the Morrow-Keeling Drug Store in Kansas City, Kansas. Co-defendant Richard Silberg managed that pharmacy for petitioner; co-defendent Frank Jones was a physician who practiced at the Central Clinic, a facility located a few blocks from the Morrow-Keeling pharmacy. Petitioner's pharmacy (Morrow-Keeling) was a "provider" under the Kansas Medicaid program. This meant that Medicaid prescriptions filled at the pharmacy could be billed directly to the State of Kansas by filing a claim form with the Department of Social and Rehabilitation Services ("SRS"). The

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[2] Petitioner's fine was reduced to $10,000 as a result of the reversal of his conviction for distributing a controlled substance. Pursuant to a sentence reduction motion, petitioner's three month prison sentence was reduced to 60 days' residence in a halfway house.

SRS then mailed its payment to the pharmacy. The reimbursement to a pharmacy included the price of the drug dispensed plus a "dispensing fee"—a service fee calculated on the basis of a particular pharmacy's operating costs and designed to assure each pharmacy a reasonable profit (Pet. App. A15). Doctors who filled their own prescriptions were not entitled to receive any service fee for dispensing the drugs. This meant that Jones was not entitled to payment by SRS of any service fee for dispensing drugs at the Central Clinic because he provided drugs only to his own patients; the clinic did not fill prescriptions written by doctors other than Jones (see Pet. 5).

In the late summer of 1975 petitioner, Jones, and Silberg entered into an agreement whereby pharmaceutical supplies were delivered to the Central Clinic and dispensed by Jones to his patients. The Medicaid reimbursement for these drugs was routed through the Morrow-Keeling pharmacy, making it appear as if the pharmacy had dispensed the drugs; the pharmacy's provider number appeared on the claims forms submitted to the SRS. The benefit of this arrangement to petitioner and his co-defendants was substantial. Jones was not entitled to any service fee for dispensing drugs at the clinic; through the arrangement with the pharmacy, however, he received a 25 cent fee, later raised to 50 cents, for each prescription. During the two and a half years that the scheme operated, Jones' fees totalled more than $27,000.

Petitioner and Silberg, whose compensation included half the pharmacy's gross profit, also benefited from the scheme. The SRS allowed each pharmacy to receive up to a prescribed maximum fee for filling a Medicaid prescription. The fee was designed to assure a reasonable profit to the pharmacy and was calculated on the basis of an operating cost study

submitted by the pharmacy. Silberg prepared and submitted the operating cost studies entitling the Morrow-Keeling pharmacy the maximum fee—$2.25 in 1976 and $2.35 in 1977 (Pet. App. A17). The evidence established that the operating expenses for the distribution of pharmaceuticals at the Central Clinic was significantly lower than the operating expenses for the Morrow-Keeling pharmacy; accordingly, prescriptions filled at the Clinic would have been subject to a lower fee. Petitioner and Silberg profited by falsely recording the prescriptions as having been filled at the Morrow-Keeling pharmacy. The Medicaid reimbursements to the Morrow-Keeling pharmacy were $31,862 in 1975, $189,319 in 1976, $282,375 in 1977, and $282,058 in 1978 (*id.* at A6).

ARGUMENT

1. Petitioner contends (Pet. 8-13) that the mere breach of a fiduciary duty not imposed by state or federal law may not be the basis for a mail fraud conviction. This contention has no merit.

Petitioner endeavors to cast his conviction for defrauding the Kansas Medicaid program of thousands of dollars in the mold of a number of recent prosecutions in which public and quasi-public officials were charged with defrauding the local citizenry of their right to have their governmental affairs conducted without corruption, fraud and dishonesty. *United States* v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, No. 82-1126 (May 2, 1983); *United States* v. *Mandel*, 591 F.2d 1347 (4th Cir.), aff'd in relevant part, 602 F.2d 653 (1979) (en banc), cert. denied, 445 U.S. 961 (1980). Petitioner's case, however, does not fit this pattern, and further review of his conviction would not clarify the central policy is-

sue in such cases—the extent to which a nonstatutory breach of fiduciary duty, standing alone, may be the basis for a mail fraud conviction.

Unlike the situations in *Margiotta* and *Mandel*, petitioner and his co-defendants engaged in a scheme to defraud that had at its heart the commission of a clearly recognized criminal act—the filing of a false document. 18 U.S.C. 1001. The claims forms submitted by the Morrow-Keeling pharmacy were clearly false—they listed that pharmacy as the provider for services actually provided at the Central Clinic. Jones' Central Clinic was not entitled to compensation from the SRS for these services.[3] There is thus no doubt that the defendants filed materially false and fraudulent claims with the state Medicaid program. Their prosecution for mail fraud—predicated on inflated reimbursement checks mailed to the pharmacy by state Medicaid officials—can hardly be characterized as arising from some breach of an ill-defined fiduciary duty.

2. There is no merit to petitioner's contention (Pet. 14-19) that the decision below conflicts with decisions of this Court and other courts of appeals concerning (a) the non-existence of federal common law; (b) criminal liability for constructive fraud; and (c) the requisite intent to deceive.

Petitioner first argues that there is no federal common law, *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938), and that the reach of the mail fraud statute is limited to "deceit or fraud as known to the law or as generally understood." *Fasulo* v. *United States*, 272 U.S. 620, 629 (1926). As unassailable as these

[3] Indeed, prior to the inauguration of the scheme, Jones received no reimbursement for prescriptions filled at his clinic (Pet. App. A16).

general propositions may be, they have no application in a case where a mail fraud conviction is predicated upon violation of a particular federal statute. In petitioner's case the submission of false claims, in violation of 18 U.S.C. 1001, obviates any need to rely on "federal common law" or an act of deceit not "known to the law or * * * generally understood."

Equally beside the point is petitioner's attempt (Pet. 15-17) to depict his conduct as a constructive fraud rather than an actual fraud. Unlike cases in which there were no material misrepresentations, *e.g.*, *United States* v. *McNeive*, 536 F.2d 1245, 1250-1251 (8th Cir. 1976), or where the standard of required conduct was uncertain, *e.g.*, *United States* v. *Rabbitt*, 583 F.2d 1014, 1024-1026 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), petitioner's violation was clear. The branch office arrangement between the Morrow-Keeling pharmacy and the Central Clinic was specifically prohibited by Kansas Administration Regulations (Kan. Admin. Regs. 68-2-16) (1978) (see Pet. App. A14). Jones' reimbursement from Medicaid funds for dispensing drugs at the clinic was also prohibited. *Ibid.*; see Kan. Admin. Regs. 30-5-21 (1978). Finally, filing the false forms with the Kansas SRS clearly constituted a "material misrepresentation" and a breach of "standards of required conduct." Thus, petitioner's effort to present his conduct as no more than a constructive fraud is an exercise in fiction.

Petitioner's various arguments are ultimately nothing more than an attack on the sufficiency of the evidence establishing the knowing falsity of the claims submitted by the pharmacy. Viewing the evidence in the light most favorable to the government, *Burks* v. *United States*, 437 U.S. 1, 17 (1978), the proof of petitioner's guilt was substantial and persuasive. The

Central Clinic was not licensed as required by state and federal law. Despite the fact that a large percentage of the pharmacy's business came from the Clinic, the Clinic was not included in the cost studies submitted to the SRS. The payments to Jones were not set out in the cost studies; indeed, they were deliberately concealed. Jones made the arrangement to use the provider number of petitioner's pharmacy to obtain reimbursement, knowing that he had not been able to get reimbursement when he was filling the prescriptions himself. The court of appeals found (Pet. App. A16-A17) this evidence to be sufficient. Petitioner has provided no reason for this Court to review that determination.

3. Petitioner contends (Pet. 19-24) that the decision below does not assure fair notice of criminality and that the decision is in conflict with decisions of this Court and a decision of the Fifth Circuit. There is no merit to this claim.

As the court of appeals noted (Pet. App. A13), petitioner was not charged with failing to comply with the Kansas Medicaid program; he was charged with mail fraud, in violation of 18 U.S.C. 1341. There is no ambiguity regarding the reach of that statute. As the court below correctly stated (Pet. App. A13), fraudulent representations "may be effected by deceitful statements of half-truths or the concealment of material facts and the devising of a scheme for obtaining money or property by such statements or concealments is within the prohibition of the statute." *United States* v. *Allen*, 554 F.2d 398, 410 (10th Cir.), cert. denied, 434 U.S. 836 (1977). There can be no doubt that petitioner had fair notice that his use of statements that concealed material facts in furtherance of a scheme to obtain money was conducted well within

the prohibition of the mail fraud statute. There is therefore no validity to petitioner's contention that he did not have notice that his conduct was criminal.

In addition, Kansas laws and regulations clearly prohibited petitioner's scheme for the distribution of pharmaceuticals at the Central Clinic and the payment of a service fee to Jones. The Central Clinic operation was clearly a "pharmacy" under Kansas law, Kan. Stat. Ann. § 65-1626(s) (Ensley 1980), and its operation by the defendants without a permit from the State was clearly illegal, *id.* § 65-1643(a). Furthermore, operating the clinic facility for the distribution of prescription drugs as a branch of the main Morrow-Keeling pharmacy was specifically prohibited by the State of Kansas. Kan. Admin. Regs. 68-2-16 (1978). Finally, the entire scheme was devised to avoid a specific Kansas prohibition against payment of a service fee to a doctor for filling his own prescription. *Id.* at 30-5-21.[4]

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[4] Petitioner claims (Pet. 21-24) that the decision below conflicts with the Fifth Circuit's decision in *United States* v. *Porter*, 591 F.2d 1048 (1979). There is no such conflict. In *Porter* the court of appeals found that a medical laboratory's practice of sharing fees with physicians who submitted blood samples of Medicare patients was not fraudulent. The court specifically found that there was no loss of Medicare funds and no submission of false statements. 591 F.2d at 1055. As the court of appeals observed here (Pet. App. A15 n.8), petitioner's conduct does not fall within the bounds of the *Porter* decision. The actual loss to the Kansas Medicaid program through petitioner's scheme was measured in thousands of dollars, and the scheme was accomplished through the repeated submission of false claims. Accordingly, no conflict exists between the decision below and the decision of the Fifth Circuit in *Porter*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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